1958

Ralph E. Child v. Board of Review of the Industrial Comm. Of Utah : Brief of Respondent

Utah Supreme Court

E. R. Callister; Fred F. Dremann; Attorneys for Defendant;

In the Supreme Court of the State of Utah

RALPH E. CHILD,

Plaintiff,

vs.

BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF THE STATE OF UTAH DEPARTMENT OF EMPLOYMENT SECURITY,

Defendant.

Case No. 8873

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On January 16, 1958, the representative of the Department of Employment Security of the Industrial Commission of Utah issued a written decision denying benefits to Ralph E. Child on the grounds that the said Ralph E. Child is President of the Ralph Child Construction Company and was not unemployed.

On January 20, 1958, the appellant, Ralph E. Child, filed a written appeal (Tr. 9). The matter was referred to the Appeals Referee on January 27, 1958 (Tr. 10). After due notice (Tr. 11) an appeal hearing was held by the Referee at Provo, Utah, on February 6, 1958. The Referee on February 10, 1958, affirmed the decision of the Department of Employment Security representative.

On February 20, 1958, the appellant, Ralph E. Child, appealed the Referee's decision to the Board of Review of the Industrial Commission of Utah. On March 28, 1958, the Board of Review affirmed the decision of the Referee (Tr. 44).

The appellant, Ralph E. Child, on April 15, 1958, appealed the decision of the Board of Review to the Supreme Court of Utah (Tr. 45, 46).

STATEMENT OF FACTS

Prior to 1956 and for some 20 odd years the appellant had been self-employed. On or about April 1, 1956, the operations of the appellant were incorporated into four separate corporations. Since that time, the appellant, Ralph E. Child, has occupied relatively the same position (i.e. President and Manager and operating head holding a majority control) in the following companies: Ralph Child Construction Company, Southeast Service, Cold Spirng Construction Company, and the Arcee Equipment Company (Tr. 14, 15, 19, 20).

Southeast Service is engaged in service station operations and hires service station attendants (Tr. 20).

The Cold Spring Construction Company is primarily engaged in holding and operating rental property under the year-round direction of the appellant as President (Tr. 19).

The Arcee Equipment Company owns, among other things, caterpillar tractors, trucks, cement mixers, power shovels, lathes, welders, saws, etc. (Tr. 23). Its business is primarily that of leasing equipment to the Ralph Child Construction Company and others (Tr. 23). The appellant as President and Manager directs its activities on a year-round basis.

The Ralph Child Construction Company engages in the construction of buildings (schools and otherwise), canals, sewers, bridges, and in the process of leveling land for farmers and others (Tr. 16). These of course are done pursuant to contracts which in many cases are obtained by bids. The affairs of the company are directed on a year-round basis by the appellant as President and Manager at a stipulated salary of $165.00 per week (Tr. 16).

On or about December 1, 1957, the Ralph Child Construction Company had no jobs in active progress and at that time the appellant, Ralph E. Child, "laid himself off" as "Manager" (Tr. 16) continuing as President without drawing the stipulated salary of $165.00 per week (Tr. 18). The record does not indicate that the Board of Directors took any action with reference to this salary question.

There is no evidence in the record to show that the appellant received any cash salary from the other three companies which he managed as President and Manager, at least during the period covered by the appellant's claims for unemployment compensation benefits.

After December 1, 1957, the appellant continued to manage the affairs of the four companies: the service station operations; the rental operations; the equipment operations; and the construction affairs, making collections and bank deposits (Tr. 18), contacting architects and examining bid proposals in trade magazines (Tr. 21), negotiating with the Small Business Administration for a loan or loans of money to support the bonds which were necessary to meet the requirements of contracts (Tr. 22), directing the work of an auditor engaged in preparing a combined statement for the several companies which would support the loan request, supervising the work of one Jane Diamond and the service station attendants (Tr. 23), directing the preparation and filing of tax returns (Tr. 24), making the decisions with reference to repair of equipment and directing the negotiating for the repair of same (Tr. 24), paying bills and signing checks (Tr. 24), expending time in an effort to rent equipment and obtain new business for the Ralph Child Construction Company (Tr. 25), and generally doing all of those day-to-day things necessary in the management and control of the operations of the four companies (Tr. 25).

It appears from the transcript that the business of the Southeast Service (service station operations) is integrated with the operations of the Ralph Child Construction Company, at least to the extent that Southeast Service monies are deposited in the bank account of the Ralph Child Construction Company; and the Southeast Service bills and expenditures are paid from the bank account, at least as to the salaries of the Southeast Service employees. Southeast Service employees are considered for the purpose of tax reports (particularly the unemployment

compensation contribution report filed with the Department of Employment Security) to be employees of the Ralph Child Construction Company (Tr. 20, 23). The number of employees reported by the Ralph Child Construction Company on its contribution report for the fourth quarter of 1957 ranges from a minimum of five employees to a maximum of ten employees (Tr. 20).

STATEMENT OF POINTS

I. THE APPELLANT, RALPH E. CHILD, WAS NOT UNEMPLOYED AND ELIGIBLE FOR BENEFITS WITHIN THE MEANING OF THE UTAH EMPLOYMENT SECURITY ACT. SECTIONS 35-4-3 AND 35-4-22(m) UCA 1953.

II. THE FINDINGS OF THE COMMISSION AND THE BOARD OF REVIEW ARE SUPPORTED BY SUBSTANTIAL EVIDENCE, AND THE COURT'S REVIEW IS CONFINED TO THE APPLICATION OF THE LAW TO THOSE FINDINGS.

ARGUMENT

POINT I

THE APPELLANT, RALPH E. CHILD, WAS NOT UNEMPLOYED AND ELIGIBLE FOR BENEFITS WITHIN THE MEANING OF THE UTAH EMPLOYMENT SECURITY ACT. SECTIONS 35-4-3 AND 35-4-22(m) UCA 1953.

The issue in this case revolves around the question as to whether or not the appellant during the period in which he was

filing claims for unemployment compensation benefits was "unemployed" within the meaning of the Employment Security Act.

Section 35-4-22(j) (1) defines employment as follows:

> " 'Employment' means any service performed prior to January 1, 1941, which was employment as defined in the Utah Unemployment Compensation Law prior to the effective date of this act, and subject to the other provisions of this subsection, service performed after December 31, 1940, including service in interstate commerce, *and service as an officer of a corporation performed for wages or under any contract of hire written or oral, express or implied.*" (Italics ours.)

Since the claimant was, during the period in question, President of the several corporations, his relationship as defined by the foregoing section was an "employment" relationship within the meaning of the Act. We are, therefore, concerned with the question as to whether or not the claimant could be considered to be "unemployed" for the purpose of drawing unemployment compensation benefits.

Section 35-4-4 UCA 1953 provides:

> "An *unemployed* individual shall be eligible to receive benefits with respect to any week only if it has been found by the Commission that: (Italics ours)
>
> "(a) He has made a claim for benefits with respect to such week . . .
>
> "(b) He has registered for work . . .
>
> "(c) He is able to work and is available for work."

When an individual files a claim for unemployment compensation benefits, the Commission or its authorized representatives must first determine, therefore, whether the individual is unemployed within the meaning of the Act.

Section 35-4-22(m) defines unemployment as follows:

> " 'Unemployment.' (1) An individual shall be deemed 'unemployed' in any week during which he performs no services and with respect to which no wages are payable to him, or in any week of less than full-time work if the wages payable to him with respect to such week are less than his weekly benefit amount. The Commission shall prescribe regulations applicable to unemployed individuals making such distinctions in the procedure as to total unemployment, part total unemployment, partial unemployment of individuals attached to their regular jobs, and other forms of short-time work, as the Commission deems necessary."

The claimant was performing services for the Ralph Child Construction Company and the other three companies; therefore the question which confronted the Commission representative was that of determining whether or not Child, the appellant, was fully employed within the meaning of the foregoing section.

We think that the Commission representative and the appeals bodies correctly found that the appellant was fully employed on a year-round basis by the corporations which engaged his services as President and operating head. The fact that Child chose to "lay himself off" as Manager without salary during the period of the year when the Ralph Child

Construction Company was not actively engaged in fulfilling job contracts did not make him any less fully employed.

In the first place, the act of Child in laying himself off without the Board of Directors taking any action did not relieve the corporation from the legal ability of paying the appellant's salary of $165.00 per week. In the second place, the appellant's duties as President and operating head of the four companies in which he held the majority of stock control did not end with the completion of the active contracts of the Ralph Child Construction Company.

The success or failure of the construction company is dependent almost entirely on the appellant in that it is his responsibility alone to obtain new contracts for the ensuing construction season and to do all of those things necessary to keep the affairs of the company in operating condition. During the period for which he claims benefits, Child was making the necessary collections and bank deposits, tax returns, etc.; signing the necessary checks in payment of expenses; and spending a substantial part of his time doing those things required to obtain a loan which would enable the corporation to furnish the bonds necessary in the performance of most construction contracts.

The services which were performed for all of the four companies were accounted for and paid by the Ralph Child Construction Company. This included the services and wages of the individuals engaged in performing the work at the Southeast Service operations. The Southeast Service operations are service station operations which continue on a year-round

basis and are directed and supervised by the appellant in this case.

The appellant also directed the work of one Jane Diamond, who, it appears from the record, did the general stenographic and day-to-day bookkeeping work of the several companies.

The appellant testified that he alone was responsible for the job of renting the equipment of the Arcee Construction Company and directing the affairs of the Cold Spring Construction Company.

It may well be that the appellant, Child, did not during the off-season period for the Ralph Child Construction Company have to maintain specific working hours. There is, however, no doubt that the appellant was required to be available during ordinary working hours to give directions and to make decisions with reference to the operations of the four companies.

So long as Child remained the operating head of the several companies charged with the responsibilities for all of the company operations, he could not have been anything but fully employed; and the representative and the Board of Review could not logically have concluded otherwise.

We have examined all of the benefit decisions of the 48 states and the territories which deal with the problem of whether or not a managing officer of a corporation could become unemployed during the tenure of office for which he is required to perform management services, and we find very few cases in point.

There is one State Supreme Court case which decides the issue involved herein. This is a New York case reported in CCH at N. Y., Paragraph 8849, in the Matter of the Claim for Benefits under Article 18 of the Labor Law made by Viola Brown, Respondent. Edward Corsi, as Industrial Commissioner, Appellant. It involves a denial of benefits to a woman, age 70, who was Secretary of a family corporation, performing services without compensation because of the financial condition of the corporation, and was decided on the grounds that it was not shown that she was available for work or that she was totally unemployed.

The Supreme Court, Appellate Division, Third Judicial Department, on March 18, 1953, said:

> "Claimant was a woman seventy years of age. Her son, her husband and herself were officers of a corporation known as the Federal Broadcasting System, Inc., which operated a radio station in Rochester, New York. Claimant was secretary of the corporation, her husband was treasurer, and their son was president. The latter owned all of the stock. The corporation was a family affair and the amount of salaries paid to the corporate officers depended on the profits in any given year. These amounts were determined solely by the son, who was the president and sole owner of the stock. At the close of the business year 1950 it was determined that the financial affairs of the corporation did not warrant payment of any salary to claimant.
>
> "The issues presented upon appeal are whether claimant, as a corporate officer performing services without compensation because of the financial condition of the corporation, was totally unemployed within the meaning of the statute, and whether she was available for employment within the meaning of the same

statute. We think there is no substantial evidence in the record to sustain the determination that claimant was available for employment and, therefore, eligible for benefits and hence that such a decision was erroneous as a matter of law. We also think that the record fails to furnish any substantial proof to sustain a finding that claimant was totally unemployed."

The Board of Review of the State of Maryland as reported in CCH, Paragraph 1338, concluded that:

> "An officer of a corporation cannot be partially unemployed so long as he holds an office since the assumption of office presupposes acceptance of the obligation to perform any services necessary in such office in the interest of the corporation during the term of office."

In the instant case, the appellant as majority stockholder accepted the obligation and responsibility for carrying on the affairs of the several companies. The fact that because of the condition of the finances of the companies he chose to quit drawing his $165.00 per week does not mean that his full-time obligation of management became any less.

The entire record shows that there was no abandonment of business by any of the companies; and, to the contrary, that each of the companies was doing business on a year-round basis to the extent that business was available.

This case bears no similarity to the case of the part-time employee who because of seasonality or other factors has been reduced from full-time hours to several hours per day or several days per week.

For the purposes of determining whether or not an individual is unemployed (see definition of unemployment supra)

the Commission must examine the facts to see whether he is performing services less than full time. If he is performing services full time under his contract of hire, as was the appellant in this case, then it is immaterial whether or not he receives payment for those services. On the other hand, if he works less than his customary full-time hours and earns less than his weekly benefit amount, he would be considered partially unemployed.

Commission salesmen, for example, who are engaged to spend their full time in the work of selling are not unemployed during those weeks in which they earn no commissions or earn commissions in the amount less than their weekly benefit amount. There is a great similarity between the commission salesman when he works several months before he makes a sale and then sees his efforts result in commissions which amply pay him for the time during which he was not receiving remuneration and the claimant who was necessarily required to do many things during the period of time when the income to the corporations was small.

The efforts of the appellant during the months in which no active job contract performance was being carried out could very well yield all of the business for the operating season; and, therefore, be the reason for the success or failure of the company on a year-round basis.

So long as the appellant remains President of the several companies with full management obligations and responsibilities, it is not possible for him to have any week of less than full-time work. The Commission and the Board of Review

correctly found that the appellant was not "unemployed" within the meaning of the Act.

POINT II

THE FINDINGS OF THE COMMISSION AND THE BOARD OF REVIEW ARE SUPPORTED BY SUBSTANTIAL EVIDENCE, AND THE COURT'S REVIEW IS CONFINED TO THE APPLICATION OF THE LAW TO THOSE FINDINGS.

Section 35-5-5 UCA 1953 provides that an *unemployed* individual shall be eligible to receive benefits with respect to any week only if it has been found by the Commission that he is unemployed, has registered for work, is able and available for work, etc., thereby making the Commission the exclusive trier of facts regarding all claims for unemployment compensation benefits.

Section 35-4-10(i) of the Act provides:

> " . . . in any judicial proceedings under this Section, the findings of the Commission and the Board of Review as to the facts as supported by evidence shall be conclusive and the jurisdiction of said Court shall be confined to questions of law . . . "

The Commission, therefore, is charged with the duties of being the fact-finding body, and the jurisdiction of this Court is limited to a review of the application of the law to those facts.

In the case of Walton vs. Wilhelm, 120 Ind. App., 93 N.E. 2d 373, the Court said:

"The duty to determine the facts has been delegated to the Board. The realistic interpretation of the facts and circumstances in evidence is absolutely essential to the successful operation of the plan . . . . In its search for the truth, the Board has the rights to consider the interest of the witness; the probability or improbability of his insertions in the light of proved or admitted facts; the general situation as shown by all of the surrounding circumstances; the conditions or compulsion under which the witness acted and under which he testified; his prejudices, if any; his desires; his apparent forthrightness or lack thereof; and many other factors.

"Haynes vs. Brown, Ind. App. 1949, 88 N.E. 2d 795. It is impossible to draw a clear line of defense between availability and unavailability. If the evidence produced by a claimant leaves the Board unconvinced of the justice of his claim or convinces the Board that he is not one of those who come within the true spirit and purpose of the Act and the evidence is not such that reasonable men would be bound to reach a different result, we are not at liberty to disturb a finding against the claimant on the question of availability."

In the case of Haynes vs. Unemployment Compensation Commission, et al, Mo. 183 S.W. 2d 77, the Court in discussing the delegation of powers to the Commission or Board stated:

"An unemployed individual is eligible to receive benefits only if the Commission finds that the required conditions have been met. The claimant assumes the risk of non-persuasion and we think the general rule applicable to ordinary court proceedings applies.

"In any judicial proceedings under this Section the findings of the Commission as to the facts, if supported by competent and substantial evidence and in the absence of fraud, shall be conclusive and the juris-

diction of said court shall be confined to questions of law. See S. S. Kresgee Company vs. Unemployment Compensation Commission, 348 Mo. 147, 152 S.W. 2d 184, 186. In a case of this character, a finding by the Commission that respondent was not 'available for work' and denying her claim for benefits on the ground she was ineligible for such benefits need not be supported by affirmative substantial evidence tending to show she was not available for work, because the burden was on her, as claimant, to show prima facie that she was entitled to the benefits claimed. See Block vs. Kinder, 338 Mo. 1099, 93 S.W. 2d 932; Conley vs. Crown Coach Company, 348 Mo. 1243, 159 S.W. 2d 281, 283."

This Court in the case of Bessie Alvord vs. Board of Review of The Industrial Commission of Utah, Department of Employment Security, 1 Ut. 2d 388, 267 P. 2d 914, said:

"The written admission of April 21, together with the testimony taken at the hearing was, as a whole, reasonably susceptible of the construction placed thereon, that her availability for work was limited, and that because of her household duties she did not desire work other than part-time during said period for which she was paid. *The finding on her non-availability was a finding of fact* and the construction of the admission was properly made in connection therewith. Title 35-4-19 (i) Utah Code Annotated 1953, provides for an appeal to the Utah Supreme Court from the Board of Review, but it limits the jurisdiction of this court as follows: (Italics ours)

'In any judicial proceeding under this section, the findings of the Commission and the Board of Review as to the facts, if supported by evidence, shall be conclusive and the jurisdiction of the said court shall be confined to questions of law.'

> "We are of the opinion that the issues involved were issues of fact, well supported by the evidence, and that the decision of the Board of Review was conclusive thereon."

In the instant case, the Commission has determined the question of the claimant's "unemployment" from a consideration of facts which are not in dispute. The appellant, Ralph E. Child, as President and Manager on a year-to-year basis for each of the four companies, had the duty and responsibility of doing all of those things connected with management and operations. The fact that he as President and Manager determined that the financial conditions of the companies indicated that he should not draw a salary starting on or about December 1 did not in any way affect those duties and responsibilities. By their very nature each of the four companies demanded and required attention and management during 12 months of each year.

As we pointed out earlier, it is absolutely essential to the successful and profitable operation of a construction business that the management of that business be constantly engaged in the performance of existing contracts; and when there are no active contracts being performed, that he be engaged in the business of doing all of those things necessary to the obtaining of new contracts.

The fact that there is a seasonality factor which limits the performance of construction contracts during the cold months of the year does not leave the appellant as President and Manager with no work or obligations during those cold months. The Commission representatives reasonably found that the claimant was fully employed on a year-round basis

and was not unemployed at the time he filed his claim for unemployment compensation benefits.

The Commission's findings are supported by the weight of the evidence, and we submit that no reasonable person confronted with the same facts would have found otherwise.

CONCLUSION

In conclusion the Industrial Commission respectfully submits that the appellant in this action was not unemployed during the period for which he claims unemployment compensation benefits, and that the findings of fact of the Commission are conclusive and that the jurisdiction of this Court is confined to questions of law and that, therefore, the decision of the Commission and the Board of Review should be affirmed.

Respectfully submitted,

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